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Aaravalli a/p S Muthiah v Dr Ng Hee Hua & Anor

B HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12A-11–03 OF 2016
ABDUL WAHAB MOHAMED JC
15 JUNE 2016

C *Civil Procedure — Discovery — Discovery and inspection of documents — Appellant sued respondents for negligently causing anosmia on her — Appellant referred to CT scan films in amended statement of claim — Respondent filed application under O 24 of the Rules of Court 2012 for discovery and inspection of CT scan films — Appellant failed to produce CT scan*
D *films — Trial court dismissed appellant's suit with liberty to file afresh — Whether production of CT scan films crucial to respondent's defence and to what extent CT scan films important to present suit — Whether respondent's application was fishing expedition — Whether failure of appellant to file affidavit in reply tantamount to admission of facts asserted by respondent — Rules of Court*
E *2012 O 24*

The appellant was a patient of the first respondent and was treated at the second respondent hospital. The appellant was diagnosed with anosmia and had undergone surgery to treat her symptoms. However, as the symptoms still
F subsisted despite the surgery, the appellant filed a suit against the respondents for negligently causing anosmia on her during the course of the surgery. In her statement of claim, the appellant had referred to two CT scan films dated 21 July 2011 and 19 January 2012 ('the CT scan films'), nevertheless, both of the CT scan films were not produced by the appellant during the suit.
G Consequently, the respondent made an application to the learned trial judge under O 24 r 11 of the Rules of Court 2012 ('the ROC') for the production of the CT scan films. Due to the failure of the appellant to produce the CT scan films, the learned trial judge dismissed the appellant's suit with liberty to file afresh, hence the present appeal. The respondents submitted that the
H productions of the CT scan films were crucial to the respondents' defence and the CT scan films were necessary to save costs and expedite the proceeding. Further, it was submitted that the appellant did not file any affidavit in reply to resist the first respondent's application for the production and inspection of the CT scan films. In response, the appellant submitted that the present
I application by the respondent was just a fishing expedition as the CT scan copy was available on the first respondent's computer. There was also an issue arose as to what extent the CT scan films was important to the suit.

Held, dismissing the appeal with costs of RM4,000 and substituting order of

dismissal with a liberty to file afresh by the learned trial judge with the order of strike out with a liberty to file afresh:

(1) On the facts, despite the appellant referring to the two CT scan films in its amended statement of claim, the appellant did not file or produce them in its bundle of documents. As the CT scan films were pleaded in the amended statement of claim, the same must be produced by the appellant. The purpose of O 24 r 16(1) of the ROC was to secure compliance relating to the production of the documents which the appellant possess and had sought to rely on in initiating the present suit. Thus, the learned judge was correct in dismissing the appellant case due to the appellant's failure to produce the two CT scan films (see paras 34 & 36).

(2) The first respondent was disadvantaged without the CT scan films. The films were pivotal in its role for the first respondent to construct his defence without which the expert who was engaged by the respondent could only give opinion base on the evaluation made post-operation. Only the two CT scan films could show the state of the appellant's health pre-operation. Further, without the production and inspection of the CT scan films, the expert could not give a proper report, resulting in disputes during the trial. The CT scan films were necessary to save costs and expedite the proceedings (see paras 46 & 48).

(3) Fishing expeditions only apply on the ground that the documents are too wide and vague. However, in the present case, the documents requested were specific and were referred to in the first respondent's notice to produce ie the two CT scan films. Further, the amended statement of claim clearly pleaded the two CT scan films (see paras 49–50).

(4) The failure of the appellant to file any reply affidavit tantamount to an admission by the appellant of the facts asserted by the first respondent in the first respondent's application for production and inspection of documents (see para 53).

[Bahasa Malaysia summary

Perayu adalah pesakit responden pertama dan dirawat di hospital responden kedua. Perayu telah didiagnoskan dengan anosmia dan telah menjalani pembedahan untuk merawat simptomnya. Walau bagaimanapun, memandangkan simptom masih ada walaupun selepas pembedahan, perayu memfailkan satu guaman terhadap responden kerana cuai menyebabkan anosmia semasa pembedahan. Dalam pernyataan tuntutannya, perayu telah merujuk kepada dua filem imbasan CT bertarikh 21 Julai 2011 dan 19 Januari 2012 ('filem imbasan CT'), namun begitu, kedua-dua imbasan CT tidak dikemukakan oleh perayu sewaktu guaman. Akibatnya, responden membuat permohonan kepada hakim perbicaraan bijaksana di bawah A 24 k 11 Kaedah-Kaedah Mahkamah 2012 ('KM') untuk pengemukaan filem imbasan

A CT. Disebabkan oleh kegagalan perayu untuk mengemukakan filem imbasan CT itu, hakim perbicaraan bijaksana menolak saman perayu dengan kebebasan untuk memfailkan baharu, maka rayuan ini. Responden mengemukakan bahawa pengemukaan filem imbasan CT adalah penting kepada pembelaan perayu dan filem imbasan CT adalah penting untuk B menjimatkan kos dan mempercepatkan prosiding. Selanjutnya, adalah dikemukakan bahawa perayu tidak memfailkan apa-apa afidavit balasan untuk menentang permohonan responden untuk pengemukaan dan pemeriksaan filem imbasan CT. Sebagai tindak balas, perayu mengemukakan bahawa C permohonan ini oleh responden hanyalah satu ekspedisi memancing dan salinan imbasan CT terdapat di komputer responden pertama. Terdapat juga satu isu timbul sejauh mana filem-filem imbasan CT adalah penting untuk saman itu.

D **Diputuskan,** menolak rayuan dengan kos sebanyak RM4,000 dan menggantikan perintah menolak dengan bebas untuk difailkan semula oleh hakim perbicaraan bijaksama dengan perintah untuk membatalkan dengan bebas difailkan semula:

E (1) Pada fakta, walaupun perayu merujuk kepada dua filem imbasan CT dalam penyata tuntutan terpindanya, perayu tidak memfailkan atau mengemukakannya di dalam ikatan dokumennya. Memandangkan filem imbasan CT telah diplidkan dalam penyata tuntutan terpinda, yang sama hendaklah dikemukakan oleh perayu. Tujuan A 26 k 16(1) KM adalah untuk menjaga kepatuhan berkaitan dengan pengemukaan F dokumen yang mana dimiliki oleh perayu dan telah memohon untuk bergantung kepadanya dalam memulakan guaman ini. Maka, hakim bijaksana adalah betul dalam menolak kes perayu disebabkan kegagalan untuk mengemukakan dua filem imbasan CT (lihat perenggan 34 & 36).

G (2) Responden pertama adalah kerugian tanpa filem imbasan CT. Filem itu adalah penting dalam peranannya untuk responden pertama membina pembelaannya yang mana tanpanya pakar yang berkhidmat untuk responden hanya boleh memberikan pendapat berdasarkan penilaian yang dibuat selepas pembedahan. Hanya dua filem imbasan CT boleh H menunjukkan tahap kesihatan perayu sebelum pembedahan. Selanjutnya, tanpa pengemukaan dan pemeriksaan filem imbasan CT, pakar tidak boleh memberikan laporan wajar, yang mengakibatkan pertikaian sewaktu perbicaraan. Filem imbasan CT adalah perlu untuk menjimatkan kos dan mempercepatkan prosiding (lihat perenggan 46 & I 48).

(3) Ekspedisi memancing hanya terpakai kepada alasan bahawa dokumen adalah terlalu luas dan samar-samar. Walau bagaimanapun, dalam kes ini, dokumen yang diminta adalah spesifik dan dirujuk dalam notis responden pertama untuk mengemukakan dua filem imbasan CT.

Selanjutnya, pernyataan tuntutan terpinda jelas memplidkan dua filem imbasan CT (lihat perenggan 49–50).

(4) Kegagalan perayu untuk memfailkan apa-apa afidavit sama seperti satu pengakuan oleh perayu terhadap fakta yang dikemukakan oleh responden pertama dalam permohonan responden untuk pengemukaan dan pemeriksaan dokumen (lihat perenggan 53).]

Notes

For cases on discovery in general, see 2(2) *Mallal's Digest* (5th Ed, 2015) paras 3139–3274.

Cases referred to

Leslie S Holmes v Engineering Service Inc [1993] 1 AMR 27 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (folld)
Nguang Chan aka Nguang Chan Liquor Trader & Ors v Hai-O Enterprise Bhd & Ors [2009] 5 MLJ 40, CA (folld)
Phoolchand Garg v Gopaldas Agarwal & Ors AIR 1990 Madras 135 (refd)
Rafidain Bank v Agom Universal Sugar Trading Co Ltd and another [1987] 3 All ER 859, CA (refd)
Taylor v Anderton (Police Complaints Authority intervening) [1995] 1 WLR 447, CA (refd)
Yekambaran s/o Marimuthu v Malayawata Steel Bhd [1993] MLJU 96 ; [1994] 2 CLJ 581, HC (refd)

Legislation referred to

Rules of Court 2012 O 24, O 24 rr 10, 11, 13, 16, 16(1), O 92 r 4

Brijnandran (Brijnandan Singh Bhar & Co) for the appellant.
Loo Peh Fern (Skrine & Co) for the first respondent.
Fazleeza bt Azli (Chan Ban Eng & Co) for the second respondent.

Abdul Wahab Mohamed JC:

INTRODUCTION

[1] This is an appeal from the appellant/plaintiff against the decision of the learned trial sessions judge striking out the appellant/plaintiff case on an application made by the first defendant/respondent under O 24 r 11 of the Rules of Court 2012 for the following orders namely:

(a) that the appellant/plaintiff allow the first respondent/defendant, its solicitors, and/or the expert witness engaged by the first respondent/defendant to inspect the CT scan film of the appellant/plaintiff dated 21 July 2011 and obtain copies of the CT scan film;

A (b) that the appellant/plaintiff allow the first respondent/defendant, its solicitors, and/or the expert witness engaged by the first respondent/defendant to inspect the CT scan film of the appellant/plaintiff dated 19 January 2012 and obtain copies of the CT scan film;

B (c) costs of this application be borne by the appellant/plaintiff; and

(d) further and/or alternatively, any orders or relief as this honourable court deems fit in order.

C BACKGROUND FACTS

[2] The appellant/plaintiff was a patient of the first respondent/defendant and was treated at the second respondent/defendant's hospital between 21 July 2011 and 16 August 2012.

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[3] The appellant/plaintiff initially came to see first respondent/defendant after being involved in a motor vehicle accident and the appellant/plaintiff was diagnosed with sinusitis and subsequently with anosmia (loss of sense of smell). The first respondent/defendant practices as a consultant ear, nose and throat surgeon at the second respondent/defendant hospital.

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[4] The appellant/plaintiff came to see the first respondent/defendant on multiple occasions complaining of a blocked nose and facial pain. The first respondent/defendant tried to treat the appellant/plaintiff conservatively for months but the symptoms were recurrent.

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[5] During the course of the appellant/plaintiff's treatment, two CT scan films were taken and developed by the second respondent/defendant. The first were taken on 21 July 2011 and the second was taken on 19 January 2012.

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[6] On 24 April 2012, after the courses of conservative treatment failed to help, the appellant/plaintiff agreed to undergo surgery to treat her symptoms. After the surgery, the appellant/plaintiff still complained of anosmia.

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[7] Dissatisfied with the outcome, the appellant/plaintiff filed a suit against both respondents for negligently causing the anosmia during the course of the surgery.

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GROUNDS OF THE FIRST RESPONDENT/DEFENDANT'S APPLICATION

[8] The appellant/plaintiff has referred to the CT scan dated 21 July 2011 in para 7 of its statement of claim and to the CT scan dated 19 January 2012 in para 16 of its amended statement of claim.

[9] The appellant/plaintiff took possession of the CT scan films dated 21 July 2011 and 19 January 2012.

[10] The first respondent/defendant sent a notice to produce under O 24 r 10 of the Rules of Court 2012 to the appellant/plaintiff on 7 August 2015.

[11] By way of letter dated 13 August 2015, the appellant/plaintiff refused to produce the requested CT scan films which are required by the first respondent/defendant to prepare its defence.

THE SESSIONS COURT DECISION

[12] The application was heard on 15 February 2016 before the learned sessions court judge, who reserved the decision to 1 March 2016 and found in favour of the first respondent/defendant:

(a) as the appellant/plaintiff could not produce the two CT scan films, the learned sessions judge, in exercising his power pursuant to O 24 r 16(1) of the Rules of Court 2012, ordered the suit to be dismissed with costs of RM1,000 to be paid by the appellant/plaintiff to the first respondent/defendant and with liberty for the appellant/plaintiff to file afresh; and

(b) the learned sessions judge found that without the production of the two CT scan films by the appellant/plaintiff, the first respondent/defendant would not have a fair trial.

[13] Thus, the appellant/plaintiff dissatisfied with the learned sessions judge's decision, filed this present appeal.

THE FIRST RESPONDENT/DEFENDANT'S SUBMISSION

[14] The first respondent/defendant submitted that the learned session judge was correct in allowing the first respondent/defendant application for production and inspection of the two CT scan films as the films are necessary for a fair disposal of trial.

[15] It is further submitted that the learned session judge was correct in dismissing the appellant/plaintiff's suit, due to the appellant/plaintiff's failure to produce the two CT scan films.

[16] Despite the appellant/plaintiff referring to the two CT scan films in its amended statement of claim, the appellant/plaintiff did not file or produce them in its bundle of documents. The first respondent/defendant submitted that as the CT scan films are pleaded in its amended statement of claim, the CT scan films must be produced by the appellant/plaintiff.

[17] The learned sessions judge has rightfully dismissed the suit due to the appellant/plaintiff's failure to comply or failure to produce the two CT scan films. The learned sessions judge was magnanimous in granting the appellant/plaintiff liberty to file afresh when the appellant/plaintiff is able to produce the two CT scan films.

[18] The first respondent further submitted that the two CT scan films are crucial to the first respondent/defendant's defence, without which, the first respondent/defendant will not be able to prove at trial he has acted in a competent fashion according to the standards expected of the medical profession.

[19] Neither the first respondent/defendant nor second respondent/defendant have or kept copies of the two CT scan films within the medical records. The original CT scan films were released to the appellant/plaintiff upon the appellant/plaintiff's request.

[20] The first respondent/defendant submitted that the CT scan films are necessary to save costs and expedite the proceeding. Without the production and inspection of the two CT scan films, the expert engaged by the first respondent/defendant, cannot give a proper report, resulting in disputes during the trial.

[21] The first respondent/defendant further submitted that the appellant/plaintiff did not file any affidavit in reply to resist the first respondent/defendant's application for the production and inspection of the two CT scan films which the failure tantamount to an admission by the appellant/plaintiff of the facts asserted by the first respondent/defendant in the application.

THE APPELLANT/PLAINTIFF'S SUBMISSION

[22] The appellant/plaintiff submitted that the appellant/plaintiff did not remember she had got the CT scan films from the second

respondent/defendant. The appellant/plaintiff stated that she will look for it if it has actually been released to her. Her husband then recollected she had taken it to the Penang General Hospital for second opinion and may have given it to the doctor there. She checked with the general hospital but got a negative reply.

[23] The appellant/plaintiff submitted that the appellant/plaintiff has all along maintained that she is unable to locate the CT scan and as such she did not file any affidavit in reply.

[24] The appellant/plaintiff further submitted that all the information on the patient, specifically on the appellant/defendant is entered into the computer and the CT scan copy is available on the computer of the first respondent/defendant or on the hard drive which can be retrieved. Therefore, the appellant/defendant submitted that this application is a fishing expedition.

[25] On the issue of preparing the defence, the appellant/plaintiff submitted that the defence has already been formulated and filed. It is contrary to the cause of justice to permit the appellant/plaintiff to refer and rely on documents and not permit the first respondent/defendant to have sight of them.

[26] The appellant/plaintiff further submitted that the CT scan film is the first respondent/defendant's document. This CT scan was taken at the second respondent/defendant hospital at the request of the first respondent/defendant. The first respondent/defendant upon reading the CT scan had made up his mind what sort of operation he would want to perform.

[27] On the issue of the learned session judge striking out the appellant/plaintiff's case for non production of the CT scan films, the appellant/plaintiff submitted that the striking out is not one of the orders/prayers prayed for in the first respondent/defendant application. Therefore the learned sessions judge was wrong in law in allowing the appellant/plaintiffs action to be struck off with cost of RM1,000.

[28] It is further submitted that the learned sessions judge should have allowed the appellant/plaintiff to proceed with the trial and the appellant/plaintiff may have her own ways to prove her case even without the benefit of the CT scan, for example, by calling an expert to support her case. Thus, because of the decision made by the learned sessions judge, the negligent of the first respondent/defendant will get away merely on the non-production of a document of which he has full knowledge whereas the CT scan films can be retrieved from the computer system of the second respondent/defendant hospital.

A THE LAW

[29] The applicable rules under O 24 of the Rules of Court 2012 ('the RC 2012') are rr 10, 11 and 13 which relevant provisions are reproduced for convenience of reference:

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10 Inspection of documents referred to in pleadings and affidavits (O 24 r 10)

(1) Any party to a cause or matter shall be entitled at any time to serve a notice in Form 43 on any other party in whose pleadings or affidavits reference is made to any document requiring him to produce that document for the C inspection of the party giving the notice and to permit him to take copies thereof.

(2) The party on whom a notice is served under paragraph (1) must, within 4 days after service of the notice, serve on the party giving the notice a notice in Form 44 stating a time within 7 days after the service thereof at which D the documents, or such of them as he does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds.

11 Order for production for inspection

E (1) If a party who is required by Rule 9 to serve such a notice as is therein mentioned or who is served with a notice under rule 10(1) —

(a) fails to serve a notice under rule 9 or, as the case may be, rule 10(2)

(b) objects to produce any document for inspection; or

F (c) offers to inspect at a time or place such that, in the opinion of the Court, it is unreasonable to offer inspection then or, as the case may be, there,

then, subject to rule 13(1), the Court may, on the application of the party entitled to inspect, make an order in Form 43 for production of the documents in question for inspection at such time and place, and in such G manner, as it thinks fit.

(2) Without prejudice to paragraph (1), but subject to rule 13(1) the Court may, on the application of any party to a cause or matter, order any other party to permit the party applying to 7 inspect any documents in the possession, custody or power of that other party relating to any matter in H question in the cause or matter.

(3) An application for an order under paragraph (2) must be supported by an affidavit specifying or describing the documents of which inspection is sought and stating the belief of the deponent that they are in the possession, custody or power of the other party and that they relate to a I matter in question in the cause or matter.

13 Production to be ordered only if necessary, etc (O 24 r 13)

(1) No order for the production of any documents for inspection or to the Court shall be made under any of the foregoing rules unless the Court is

of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs. A

FINDING OF THE COURT

[30] This is the appellant/plaintiff's appeal against the decision of the learned sessions judge who allowed the first respondent/defendant's application for the production and inspection of the two CT scan films under O 24 r 11 of the Rules of Court 2012. The learned sessions court also dismissed the appellant/plaintiff's suit, due to the appellant/plaintiff's failure to produce the two CT scan films. B C

[31] A defendant is entitled to inspect documents referred to in the affidavit of the plaintiff and such documents referred to but not produced by the plaintiff, can be called for by the defendant by way of discovery and the defendant will have the right of inspection thereof (see *Phoolchand Garg v Gopaldas Agarwal & Ors* AIR 1990 Madras 135 at p 140). D

[32] It is important for me to note in this case that the appellant/plaintiff had referred to the: E

(a) CT scan film taken on 21 July 2011 at para 7 of its amended statement of claim; and

(b) CT scan taken on 19 January 2012 at para 16 of its amended statement of claim. F

[33] I refer to the Court of Appeal case of *Rafidain Bank v Agom Universal Sugar Trading Co Ltd and another* [1987] 3 All ER 859 where it was held that the court has jurisdiction to order discovery of documents referred to in a party's pleadings and affidavits notwithstanding that the documents were not in the custody, possession or power of that party, but the absence of custody, possession or power could well amount to a good cause for the court to refuse to exercise its discretion. In that case Watkins LJ also made the following observation: G

> *I see no reason whatsoever why the broad scope of rr 10 and 11 should be restricted in any way subject of course to the exercise of the court's discretion. It is plain to me that the additional power given to the court in rule 11(2) contains an exceptional restriction, namely that the making of an order is dependent on whether the documents sought are in the possession, custody or power of the party to whom the order if made is directed.* (Emphasis added.) H I

[34] In this case before me, despite the appellant/plaintiff referring to the two CT scan films in its amended statement of claim, the appellant/plaintiff did not file or produce them in its bundle of documents. As the CT scan films

A are pleaded in the amended statement of claim, I am of the considered view that the CT scan films must be produced by the appellant/plaintiff.

[35] Order 24 rule 16 of the Rules of Court 2012 reads as follows:

B 16 Failure to comply with requirement for discovery

(1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case C of a failure to comply with any such provision, to rule 11(1), the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and the judgment be entered accordingly.

D **[36]** In other words, the purpose of O 24 r 16(1) of the Rules of Court 2012 is to secure compliance relating to the production of the documents which the appellant/plaintiff possess and has sought to relied on in initiating this suit. Thus, having gone through the law, I am of the opinion that the learned session judge was correct in dismissing the appellant/plaintiff case, due to the E appellant/plaintiff's failure to produce the two CT scan films.

[37] I now deal with the issue to what extent the CT scan films is important to this suit. Edgar Joseph Jr SCJ sitting at the High Court of Penang in the case of *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96; F [1994] 2 CLJ 581 stated at p 585 of the report as follows:

The essential elements for an order for discovery are threefold; namely, first there must be a 'document', secondly, the document must be 'relevant' and thirdly, the document must be or have been in the 'possession, custody or power' of the party against whom the order for discovery is sought.

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[38] Further down the same page, His Lordship Edgar Joseph Jr SCJ had this to say:

As to 'relevance', our Rules of the High Court limit discovery to documents which H are 'relevant to' or 'relate' to the factual issues in dispute.

More particularly, the discovery obligation applies to documents 'relating to matters in question in the action' (Rules of the High Court, O 24 r 1(1)) or 'relating to any matter in question in the cause or matter' (O 24 r 3(1)). In practice, relevance is primarily determined by reference to the pleadings but there need not be a pleading for a matter to be said to be in issue (see *Phillips v Phillips* [1879] 40 LT 815, 821). I In this context, relevance is defined broadly. It does not extend to documents relevant merely to a party's credibility unless that itself is a fact in issue (see *George Ballantine & Sons Ltd v Dixon & Son Ltd* [1974] 1 WLR 1125). If, however, the document's relevance is to a fact in issue, not simply to credibility, it has long been settled that relevance of an indirect kind suffices.

[39] Continuing further on the same page, this was what His Lordship Edgar Joseph Jr SCJ said: A

> The observation of Edward Bray in his highly regarded work on discovery at p 18 as to the test of 'materiality' merits quotation; there he says this:
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> ... for the purpose of testing the materiality of the discovery to a particular issue ... it is the case of the party seeking the discovery that must be assumed to be true, and not that of the party from whom the discovery is sought. B
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> I note that proposition received judicial approval in *Format Communications Mfg Ltd v ITT (UK) Ltd* [1983] FSR 473 CA.

C

[40] Thus reverting to the present case, the appellant/plaintiff has clearly relied on the two CT scan films in its amended statement of claim at paras 7 and 16. The evidence supporting the fact that the two CT scan films are with the appellant/plaintiff is not rebutted by the appellant/plaintiff. In addition, the appellant/plaintiff has made an admission that she could not locate the two CT scan films. D

[41] I am of the opinion that the CT scan films are crucial to the first respondent/defendant's defence, without which, the first respondent will not be able to prove at the trial that he has acted in a competent fashion according to the standards expected of the medical profession. The crippling of the first respondent/defendant's case by the appellant/plaintiff's failure to produce the two CT scan films will inhibit the just and fair disposal of this suit. E

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[42] At this juncture, I am of the considered view that if this court does not dismiss the suit due to the appellant/plaintiff's failure to comply with an order for the production and inspection, then the first respondent/defendant will effectively be denied a fair trial. The appellant/plaintiff will be free to refuse to comply with no consequences and will further be able to capitalise its position with an unfair advantage G

[43] I am also of the opinion that the learned session judge was correct in his finding that the two CT scan films are necessary for the first respondent/defendant to inspect for the purpose of trial. The law says that the court has power to order the production and inspection of the document under O 24 r 11 and 13 of the Rules of Court 2012, or under the inherent jurisdiction pursuant to O 92 r 4 of the Rules of Court 2012. H

[44] Again, I am of the considered view that the two CT scan films are vital for the expert to form a full and cohesive opinion. The CT scan films are necessary in the preparation of the first respondent/defendant's defence. Therefore, without the said CT scan films, it would undoubtedly cause an unfair disposal of the case. I

[45] In this regard, I am agreeable with the decision in the case of *Nguang Chan aka Nguang Chan Liquor Trader & Ors v Hai-O Enterprise Bhd & Ors* [2009] 5 MLJ 40, the Court of Appeal held at pp 40–41:

> Under O 24 r 13(1) of the RHC, an order for the production of documents for inspection is not to be made unless the court is of the opinion that such order is necessary either for disposing fairly of the case or matter or for saving costs. It is for the party seeking production to satisfy the court that such production is necessary for the purpose specified in r 13(1). The court would dismiss a plaintiff's application for discovery if the plaintiff is merely fishing for evidence to prop up his case and to allow him discovery would be unduly oppressive to the party giving discovery.

[46] Thus reverting to the present case, I am of the opinion that the first respondent/defendant is disadvantaged without the CT scan films. The films are pivotal in its role for the first respondent/defendant to construct his defence. Without the CT scan films, the expert who engaged by the first respondent/defendant can only give opinion base on the evaluation made post op. Only the two CT scan films can show the state of the appellant/plaintiff's health pre-op.

[47] And in considering the application the court should bear in mind the words of Sir Thomas Bingham MR in *Taylor v Anderton (Police Complaints Authority intervening)* [1995] 1 WLR 447 at p 462 that:

> The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection.

[48] In addition, I am of the considered view that if the two CT scan films are produced, the expert engaged by the first respondent/defendant will be able to prepare a thorough expert report based on all the documents pleaded. Without the production and inspection of the CT scan films, the expert cannot give a proper report, resulting in disputes during the trial. The CT scan films are necessary to save costs and expedite the proceedings.

[49] On the issue of 'fishing expedition' submitted by the appellant/plaintiff, I would hereby highlight the case of *Leslie S Holmes v Engineering Service Inc* [1993] 1 AMR 27, where, inter alia, it says that fishing expeditions only apply on the grounds that the documents are too wide and vague.

[50] Thus reverting to the present case, I am of the opinion that the documents requested are specific and are referred to in the first respondent's notice to produce ie the two CT scan films. Furthermore, the amended statement of claim clearly pleaded the two CT scan films.

[51] It is pertinent for me to note that, from the evidence, it is an undisputed fact that the appellant/plaintiff has taken possession of the said two CT scan films. The importance of the said CT scan films is not negated by the examination of the expert or the witnesses. The said CT scan films were taken before the operation, giving conclusive evidence as to the state of the appellant/plaintiff's condition prior to the operation.

[52] On the issue the appellant/plaintiff did not file any affidavit in reply to resist the first respondent/defendant's application, in this regard, I am agreeable with the decision in the case of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, where the Court of Appeal held at p 281 that:

> In evaluating affidavit evidence, where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted.

[53] Thus reverting to the present case, I am of the opinion that the failure of the appellant/plaintiff to file any reply affidavit tantamount to an admission by the appellant/plaintiff of the facts asserted by the first respondent/defendant in the first respondent/defendant's application for production and inspection of documents.

CONCLUSION

[54] In conclusion, based on the above said reasons, the appeal filed herein is dismissed with cost of RM4,000 to be paid forthwith by the appellant/plaintiff to the first respondent/defendant.

[55] Nevertheless, I substitute the order of dismissal with a liberty to file afresh by the learned session judge with the order of strike out with a liberty to file afresh.

Appeal dismissed with costs of RM4,000; order of dismissal with liberty to file afresh by learned trial judge substituted with order of strike out with liberty to file afresh.

Reported by Dzulqarnain Ab Fatar